I 1.69/a : 86/5

JOHN MOORE ET AL.

40 IBLA 321

Decided *April 30, 1979*

Appeals from decisions of the Alaska State Office, Bureau of Land Management, rejecting Native allotment applications A-060257, etc.

Set aside and remanded.

1. Administrative Procedure: Hearings—Alaska: Native Allotments—Rules of Practice: Hearings

Alaska Natives who allege substantial use and occupancy of vacant, unappropriated, and unreserved public land in Alaska for a period of at least 5 years pursuant to the Act of May 17, 1906, *as amended*, 43 U.S.C. §§ 270–1 to 270–3 (1970), and the regulations at 43 CFR Subpart 2561 are entitled to notice and an opportunity for a hearing prior to rejection of their application. Such notice shall specify the reasons for the proposed rejection. Claimant shall have an opportunity to present evidence and testimony of favorable witnesses at a hearing before the trier of fact prior to a decision.

2. Administrative Procedure: Generally—Alaska: Native Allotments—Contests and Protests: Generally—Hearings—Rules of Practice: Government Contests

Where the Bureau of Land Management determines that an Alaska Native allotment application should be rejected because the land was not used and occupied by the applicant, the BLM shall issue a contest complaint pursuant to 43 CFR 4.451 *et seq.* Upon receiving a timely answer to the complaint, which answer raises a disputed issue of material fact, the Bureau will forward the case file to the Hearings Division, Office of Hearings and Appeals, Department of the Interior, for assignment of an administrative law judge, who will proceed to schedule a hearing, at which the applicant may produce evidence to establish entitlement to his allotment.

APPEARANCES: Alaska Legal Services Corp., for appellants.

OPINION BY CHIEF ADMINISTRATIVE JUDGE FRISHBERG
INTERIOR BOARD OF LAND APPEALS

The appeals which have been consolidated for the purpose of this decision all involve Native allotment applications filed pursuant to the Act of May 17, 1906, *as amended*, 43 U.S.C. §§ 270–1 to 270–3 (1970) (repealed subject to pending applications, sec. 18(a), Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (1976)), and the implementing regulations at 43 CFR Subpart 2561. The cases are identified in Appendix A attached hereto. All of the applications in the subject cases have been rejected in whole or part because the evidence in the record failed to establish the required use and occupancy. Thus, a common factual issue in all of the cases is the nature and extent of use and occupancy of the land claimed by the applicant.

[1] The Ninth Circuit Court of Appeals has ruled that "Alaska Natives who occupy and use land for at least five years, in the manner specified in the Act and the regulations, * * *" are entitled to due

process in the adjudication of their applications for allotment of that land. *Pence* v. *Kleppe*, 529 F. 2d 135, 141–42 (9th Cir. 1976). The court ruled that due process requires, at a minimum, that

> applicants whose claims are to be rejected must be notified of the specific reasons for the proposed rejection, allowed to submit written evidence to the contrary, and, if they request, granted an opportunity for an oral hearing before the trier of fact where evidence and testimony of favorable witnesses may be submitted before a decision is reached to reject an application for an allotment.

Pence v. *Kleppe*, *supra* at 143.

[2] The Board subsequently ruled that the due process requirements set forth in the decision in *Pence* v. *Kleppe*, *supra*, may be implemented by applying the Departmental contest procedures found in the regulations at 43 CFR 4.451–1 to 4.452–9. In the adjudication of Native allotment applications presenting a factual issue as to the applicant's compliance with the use and occupancy requirements of the statute and implementing regulations,[1] BLM must initiate a contest giving the applicant notice of the alleged deficiency in the application and an opportunity to appear at a hearing to present favorable evidence prior to rejection of the application. *Donald Peters*, 26 IBLA 235, 241–242, 83 I.D. 308 (1976), *reaffirmed*, *Donald Peters* (*On Reconsideration*), 28 IBLA 153, 83 I.D. 564 (1976).

The Court of Appeals has recently held that application of the Departmental contest procedures to provide the allotment applicant with notice and an opportunity for a hearing prior to adverse action on the allotment application as outlined in the decisions of the Board in *Donald Peters*, *supra*, and *Donald Peters* (*On Reconsideration*), *supra*, complies, at least facially, with the due process requirements set forth in the court's mandate in *Pence* v. *Kleppe*, *supra*. *Pence* v. *Andrus*, 586 F. 2d 733 (9th Cir. 1978).

Accordingly, upon remand of the subject cases BLM should review the case file, including any submissions filed subsequent to the initial decision below. Where it is determined that the application should still be rejected in whole or in part because of the failure of the record to establish applicant's use and occupancy of the land in compliance with the requirements of the statute and regulations, BLM should initiate a contest proceeding in accordance with our decision in *Donald Peters*, *supra*.[2]

[1] Cases involving issues of fact as to the nature and extent of use and occupancy by the Native claimant may be distinguished from cases where the BLM determines that, assuming the truth of all relevant matters stated in the application, the application must be rejected as a matter of law. In the latter context, an application may be rejected without a hearing, subject to the right of appeal to the Board. *Donald Peters*, *supra* at 241 n. 1; *see Pence* v. *Andrus*, 586 F. 2d 733, 743 (9th Cir. 1978).

[2] The records disclose that some of the cases involve conflicting State and Native village selection applications filed subsequent to the date the Native allotment applicant's use and occupancy allegedly commenced. Such conflicting applicants should be given notice and an opportunity to participate in any contest proceedings initiated. In the event the BLM after review of the record on remand determines that a Native allotment application should be granted, any conflicting applicant should be given notice and an opportunity to initiate a private contest.

Several additional issues have been briefed before the Board in certain of the cases. Counsel has briefed the issue of what constitutes use and occupancy in the Native manner, including the question of whether improvements are required and whether allotments can be restricted to the area of the improvements. The Board has held that use and occupancy under the Alaska Native Allotment Act contemplates possession which is at least potentially exclusive of others and not mere intermittent use. *John Nanalook*, 17 IBLA 353 (1974). However, it has been expressly noted that consideration must be afforded to Native customs and mode of living, climate, and the character of the land. Further, permanent improvements as an index of use are not necessarily a prerequisite in appropriate circumstances where the claim is supported by sworn statements of credible witnesses with first hand knowledge of the facts and there are no conflicting adverse claimants. *John Nanalook, supra.* In the absence of any evidence of the nature and extent of applicant's use and occupancy which may be introduced at a hearing, it is inappropriate to define further what constitutes qualifying use and occupancy—cases must be decided on an individual basis according to the evidence.

Counsel for some of the allotment applicants has argued that 5 years of use and occupancy is not required. This issue is well settled. The terms of the statute and the implementing regulation of the Secretary of the Interior both require proof of substantially continuous use and occupancy of the land for a period of 5 years by the applicant, 43 U.S.C. § 270–3 (1970) and 43 CFR 2561.2, without regard to whether the land is within a national forest or part of the unreserved public domain. *See also Medina Flynn*, 23 IBLA 288 (1976); *Paul Koyukuk*, 22 IBLA 247 (1975); *Heldina Eluska*, 21 IBLA 292 (1975); *Warner Bergman*, 21 IBLA 173 (1975).

An allotment right is personal to one who has fully complied with the law and the regulations, and a Native may not tack on parental or ancestral use and occupancy to establish that right. *Sarah F. Lindgren*, 23 IBLA 174 (1975); *Lula J. Young*, 21 IBLA 207 (1975). Substantial use and occupancy as contemplated by the Act must be by the Native as an independent citizen for himself and not as a minor child using the land in the company of his parents. *Natalia Wassilliey*, 17 IBLA 348 (1974). Whether an applicant's use and occupancy is sufficiently independent to qualify can best be determined after relevant evidence is elicited at the hearing.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are set aside and the cases remanded for further

proceedings consistent with this decision.

NEWTON FRISHBERG,
Chief Administrative Judge.

WE CONCUR:

JAMES L. BURSKI,
Administrative Judge.

DOUGLAS E. HENRIQUES,
Administrative Judge.

APPENDIX A

70-526: MOORE, John—A-060257
75-6: BOGEYAKTUK, Anatole—F-12783
75-77B: KICHOK, Farmer—AA-7181
75-392: AYOJIAK, Moses—AA-6297
75-400: SINKA, Cecilia—F-18167
75-423: GREGORY, Gabby A.—AA-6277
75-430: CARLO, Kenneth J.—F-14016
75-438: LINUS, Kathleen—F-14264
75-447: (a) EVAN, Elena—A-056034
(b) BAVILLA, Evan—AA-6623
(c) ATAKITLIG, Olia P.—AA-7402
(d) NELSON, Eleanor—AA-7704
(e) NANALOOK, Moses—AA-7978
75-462: (a) COOPCHIAK, John—AA-6355
(b) BAVILLA, Anuska—AA-7404
(c) FULLMOON, Sam—AA-7410
(d) KRITZ, Anecia—AA-7442
75-469: NANALOOK, Emma—AA-7322
75-471: NELSON, JR., Alex—AA-7715
75-472: EVAN, Carl L.—A-056064
75-474: NECK, Lloyd—AA-7416
75-475: ANDREWS (HAWKINS), Rosalind M.—F-16234
75-477: WHYMN, Pavilla—AA-7057
75-478: MATSON, Lena—AA-7940
75-481: NICK, Willie—AA-7420
75-482: WASSILLIE, Andrew—AA-6723
75-484: LUKE, Gladys—F-14724
75-495: PEDERSEN, Alvin N.—AA-5984
75-497: KANULIE, Mary—AA-7441
75-498: WALLIS, Marguerite Roehl—AA-7241
75-501: TITUS, Dorothy—F-14538
75-502: (a) MILLER, Fred—F-17742
(b) SNOW, JR., Peter—F-17788
(c) ANDERSON, Dorothy A.—F-18974
75-520C: MYOMICK, Flora—F-16239
75-521: SHARP, Ferdinand—AA-7423
75-533: PETE, Agatha—F-16390
75-534: MONSEN, Annie—AA-7907
75-540: BARTMAN, Gust—A-055105
75-541: BLUE, Robert T.—AA-6353

75-543: ESAI, Esai—F-17180
75-544: ESAI, SR., Bobby—F-17520
75-545: ELUSKA, Steve—F-16051
75-546: SNOW, Evelyn—F-17792
75-547: JOHN, Mary—F-17768
75-548: ANDREWS, Heldina—F-17638
75-549: NICKOLI, Nickiti—A-056300
75-552: WASKEY, Agafia—AA-7186
75-553: AYOJIAK, Willie—AA-6350
75-555: WILLIAMS, Edison—F-14286
75-560: SNOWBALL, Mark—F-16400
75-561: RAYMOND, Adam J.—F-16397
75-591: PETE, Daisy—F-16392
75-598: ACOMAN, Clyde W.—F-16412
75-599: OTTEN, SR., Ambrose A.—F-18431
75-600: ALEXIA, Bernie—F-17870
75-612: ESAI, Minnie Dora—F-17521
75-613: ATCHAK, Archie B.—F-16413
75-624: APOSIK, Adam D.—AA-7452
75-651: KINIKALK, Evan—AA-7967
75-663C: PAVIAN, Henry—AA-7266
76-48: ANDERSON, Alburn A.—F-16287
76-49: ESAI, Pauline Dennis—F-17522
76-66: SMITH, Freda W.—F-18383
76-86: OLICK, Ignaty—F-17075
76-129: ODOMIN, SR., Nick—AA-6004
76-130: PETER, Lena—F-034711
76-135: OPOKEDAK, Stephanita—AA-6374
76-149: REFT, JR., Gust J.—AA-7475
76-151: NICKOLAI, Murphy—A-059290
76-156: GAMECHUCK, Billie—A-056042
76-157: ANDERSON, Ralph S.—F-18305
76-158: SAM, Elma—F-14323
76-177: WASULI, Sando—F-16411
76-197: SHOWALTER, James R.—F-15467
76-201: CHYTHLOOK, Molly B.—AA-7281
76-223: BLUE, Agnes—F-15241
76-224: HOELSCHER, Agnes T.—F-16142
76-225: ALFRED, Blanche—F-17054
76-226: FRANK, Henry—F-17061
76-228: BOBBY, Nick—F-16491
76-229: EVAN, Nastasia—F-16494
76-231: WASSILLIE, Mary—AA-6268
76-232: TRIPLETT, Elena A.—F-17222
76-233: MANN, David—F-17215
76-235: FERRIS, Jean F.—F-16225
76-236: ROMER, Mary F.—F-18203
76-239: NICK, Cecelia—F-19199
76-250: ODINZOFF, Joseph E.—F-16387
76-253: LOCKWOOD, James—F-18301

76-254: SNOWBALL, SR., Timothy—F-16045
76-255: NEWMAN, Florence—F-12611
76-256: GUSTY, Alice—F-16495
76-257: MIKE, Gregory—AA-6262
76-261: CHARLES, Della—F-15898
76-262: TUGATUK, Wassillie—AA-7215
76-267: JAMES, Lillian—F-14789
76-273: KAWAGLEY, Mary Alice—F-16148
76-275: PETE, Elias—F-16393
76-307: TRITT, Lincoln—F-18450
76-308: ZAUKAR, Marvara—F-16497
76-310: GILBERT, Trimble—F-12606
76-318: WELLS, Walter—F-18822
76-322: JACK, Helen A.—F-16377
76-323: WILLIE, Katherine R.—F-16049
76-335: TRITT, Franklin—F-17443
76-367: WASHINGTON, Oswald J.—F-16409
76-374: GILBERT, Mary—F-12607
76-375: GOODWIN, Pearl Out-Water—F-17980
76-379: BIDDLE, Doris Begay—F-14711
76-389: FOXIE, Cecilia—F-18751
76-390: McCARR, Walla—AA-7183
76-399: NERBY, JR., John O.—F-16154
76-400: NICHOLAS, SR., Wilbert—F-15950
76-406: EDWARDS, Jimmie—F-14319
76-409—ABSTON, Reginia C.—AA-7316
76-410: ROCK, Bertha—F-13859
76-412: WOODFORD, Ralph—F-15480
76-415: MATHLAW, SR., Rex—F-18463
76-425: KUSEGTA, Gus—A-05510
76-427: SULLIVAN, Larry—AA-7876
76-436: LINDGREN, SR., Benjamin P.—AA-8235
76-437: WASKA, George—F-18285
76-438: WILLIAMS, George E.—A-061299
76-444: (a) BERGMAN, Grafton L.—F-13520
(b) ENGLISHOE, Ronald S.—F-13836
(c) WILLIAMS, Mark H.—F-14735
76-445: REED, Tommy—F-17939
76-446: ARSENTI, Willie—AA-7380
76-457: GRIEST, Oscar A.—F-18004
76-472: TENAS, Charley—A-053876
76-475: LARSON, Mary S.—AA-7688
76-477: MALUTIN, Lydia—AA-7312
76-479: JOHN, Vonga—F-14293
76-485: EDWIN, Issac S.—F-027065
76-492: ALOYSIUS, SR., Jake—F-022857
76-493: MALUTIN, JR., Herman—AA-7310
76-494: MALUTIN, Jessie J.—AA-7311
76-504: GLOKO, Andrewski—AA-7213

76-519: AGA, Alberta E.—AA-7395
76-520: BUTLER, Shirley A.—F-15539
76-523: KAPATAK, Tantania—AA-7662
76-543: LEAVITT, Judy M.—F-13671
76-578: WASKA, Peter—F-13269
76-688: PANNINGONA, Dorothy—F-17781
77-6: JAMES, George—AA-7741
77-32: STEPANOFF, Walter—AA-5980
77-33: KITCHOK, Nick—AA-7599
77-34: WASSILLIE, Wassillie—AA-6301
77-35: HERRMAN, Gerald L.—AA-6283
77-277: PANRUK, David—F-17818
77-279: TIRCHICK, Peter F.—F-17821
77-326: BUNYAN, Gertrude M.—F-14690

APPEAL OF RAYMOND E. MILLER

3 ANCAB 238

Decided *May 14, 1979*

Appeal from a decision of the Bureau of Land Management AA-6701-D, 43 FR 14542 (Apr. 6, 1978).

Reversed and remanded.

1. Alaska Native Claims Settlement Act: Land Selections: Valid Existing Rights

An open-to-entry lease issued under A.S. 38.05.077, including any associated right to purchase the leased land granted by State statute, is protected as a valid existing right under ANCSA, and the leasehold must be excluded from any conveyance to a Native corporation under ANCSA.

2. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Reconsideration

Where a person received no notice of a decision affecting his open-to-entry lease, and where the Secretary has reconsidered and reversed the Board's ruling on valid existing rights in an appeal from that decision, the Board considers these circumstances extraordinary within the meaning of 43 CFR 4.21(c) and will reconsider its ruling.

APPEARANCES: Charles R. Tunley, Esq., on behalf of Appellant, Raymond E. Miller; M. Francis Neville, Esq., Office of the Regional Solicitor, on behalf of the Bureau of Land Management.

OPINION BY
ALASKA NATIVE CLAIMS APPEAL BOARD

SUMMARY OF APPEAL

This appeal involves the issue of whether an open-to-entry lease, issued by the State of Alaska before enactment of ANCSA, including associated rights to purchase the leased land, is protected from Native selection as a valid existing right under ANCSA. A related question is the effect of Secretarial Order 3029, regarding valid existing rights, on the Board's previous rulings on this point and on this appeal.

JURISDICTION

The Alaska Native Claims Appeal Board, pursuant to delegation of authority in the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601–1627 (1976), and the implementing regulations in 43 CFR Part 2650, and Part 4, Subpart J (1977), hereby makes the following findings, conclusions and decision reversing the decision of the Bureau of Land Management AA–6701–D, 43 FR 14542 (Apr. 6, 1978).

Mr. Miller appeals a decision of the Bureau of Land Management (BLM) published Apr. 6, 1978, covering land selections under the Alaska Native Claims Settlement Act (85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601–1627 (1976)) (hereinafter ANCSA) by Seldovia Native Association, Inc. (AA–6701–B and AA–6701–D), and under the Alaska Statehood Act (72 Stat. 339 (1958), hereinafter Statehood Act) by the State of Alaska (A–050903).

BLM previously adjudicated the same land selections in a decision dated Oct. 6, 1975, on the State's selection A–050903, and in a second decision dated Oct. 9, 1975, on Seldovia's selections AA–6701–B and AA–6701–D. The two decisions were not published in the *Federal Register* or in a newspaper. Both decisions were timely appealed to the Board. Docketed respectively as ANCAB VLS 75–14 and VLS 75–15, they were consolidated for decision and, after extensive briefing, were decided June 9, 1977. The issues involved the status, as valid existing rights under ANCSA, of third-party interests created by the State on lands tentatively approved for selection under the Statehood Act, and then approved for conveyance to Seldovia Native Association under ANCSA. The Board found that valid existing rights protected under ANCSA must be identified in a BLM decision to convey lands, and that open-to-entry leases issued by the State of Alaska were protected as valid existing rights by § 14(g) of ANCSA. However, the Board also found that the right to purchase the leased lands, associated with the lease, was not protected under § 14(g) because it was an interest leading to fee title, and was not protected under § 22(b) of ANCSA because it was a State-created interest. The appeal was remanded to BLM for action consistent with the decision.

On Apr. 6, 1978, BLM published a new decision, reflecting action on the remand, in the *Federal Register*. (43 FR 14542 (1978).) All lands covered by this April 1978 decision were previously included in the decisions of October 1975.

However, the 1978 decision included the following findings, not a part of the 1975 decisions:

> (It should be noted that lands covered by open-to-entry leases identified as ADL Nos. 29454, *41005*, 41084, 41085, 41425, 41553, 41704, 41862, 42889, 42909, 42954, 44546, 45000, 45373, 47021, 47164, 51665, 55132, 55137, 55138, and 55210 were excluded from the selection application filed by Seldovia Native Association, Inc.

Regulation 43 CFR 2651.4(b) provides that:

"* * * Selections shall be * * * reasonably compact * * *. The total area selected will not be considered to be reasonably compact if (1) it excludes other lands available for selection within its exterior boundaries; or (2) lands which are similar in character to the village site or lands ordinarily used by the village inhabitants are disregarded in the selection process; or (3) an isolated tract of public land of less than 1,280 acres remains after selection."

The selection as filed does not meet the requirements for compactness as required by section 12(a)(2) of ANCSA and the regulation given above. Therefore, the lands excluded by Seldovia Native Association, Inc., are considered selected in order that the requirements for compactness are met.)
[Italics added.]

BLM included in the 1978 decision a standard appeals paragraph stating that the decision could be appealed to the Board. Appellant, Raymond Miller, holder of an open-to-entry lease ADL #41005, excluded from selection by Seldovia but included by BLM because of requirements for compactness and contiguity, timely filed the present appeal.

It is evident from the record, and undisputed by the parties, that while all lands covered by the BLM decisions of April 1978, were previously included in the decisions of October 1975, Mr. Miller's open-to-entry lease was identified for the first time in the 1978 decision. Further, because Mr. Miller's lease was not included in a listing of third-party interests provided to BLM by the State of Alaska at the time of the 1975 decisions and resulting appeals, neither BLM nor the Board notified Mr. Miller of the earlier decisions or of his appeal rights.

STATUS OF OPEN-TO-ENTRY LEASE AS VALID EXISTING RIGHT

The Statehood Act granted to the newly-created State the right to select approximately one hundred and three million acres of land and authorized the State to execute conditional leases and conditional sales of selected lands, after tentative approval of the selection but before issuance of patent. (72 Stat. 339 *et seq.* (1958).)

The State issued "open-to-entry" leases under a statutory program to provide individuals with small tracts of recreational land. (A.S. 38.05.077.) If the State has tentative approval for its selection of the land, and the land has been surveyed, the lessee may relinquish his lease and acquire patent to the entry by negotiated purchase.

The leasehold interest is clearly protected as a valid existing right under § 14(g) of ANCSA, which provides:

All conveyances made pursuant to this Act shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this Act, a lease, contract, permit, right-of-way, or easement (including a lease issued under section 6(g) of the Alaska Statehood Act) has been issued for the surface or minerals covered under such patent, the patent

shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him. * * *

The issue is whether the lessee's right to purchase the land is also protected by ANCSA, and, if so, how it is protected in the conveyance procedures followed by BLM.

The Board has ruled that the right to purchase associated with an open-to-entry lease is not protected as a valid existing right under ANCSA. The Board held:

* * * all copies of open-to-entry leases in the record * * * are identical and * * * do not contain provisions to purchase the leased land. The leases provide only for renewal upon the expiration of the five-year term and for removal or disposal by sale of any improvements placed on the leasehold by the lessee upon termination of the lease. Therefore, while § 14(g) specifically provides that a patent issued under ANCSA shall be "subject to the lease * * * and the right of the lessee * * * to the complete enjoyment of all rights, privileges, and benefits thereby granted to him," the right of purchase asserted under A.S. 38.05.077 is not granted by the lease, but appears to be, rather an associated preference right granted in connection with the leasing program to individuals holding such leases.

Further, the asserted right to purchase lands held under an open-to-entry lease can be exercised under the State statutes only if the lease is relinquished. The relinquishment of the lease and subsequent issuance of patent would constitute a new interest created subsequently to ANCSA, contrary to § 11(a)(2) which specifically withdraws lands TA'd to the State "from the creation of third party interests * * * under the Alaska Statehood Act."

Finally, under ANCSA, the selecting Native Corporations will receive title to certain lands previously TA'd to the State of Alaska. Therefore, as to such lands, the State may not extend a preference right to purchase lands to which a Native Corporation, rather than the State, will hold title. Although a Native Corporation, succeeding under § 14(g) to the interest of the State as lessor may wish to sell the leased land to the lessee, the Board finds no mechanism in ANCSA for the enforcement of such a right in the lessee against a Native patentee.

(*Appeal of State of Alaska* and *Appeal of Seldovia Native Association, Inc.*, 2 ANCAB 1, 61–62, 84 I.D. 349, 376–377 (1977) [VLS 75–14/75–15].)

The Board has also previously reached the conclusion that ANCSA protects, as "valid existing rights," only those rights which do not lead to acquisition of a fee title. The Board ruled, in *Appeal of Eklutna, Inc.*, 1 ANCAB 190, 83 I.D. 619 (1976) [VLS 75–10], that rights leading to acquisition of title were excluded from conveyance to the selecting Native corporation under § 22(b) of ANCSA, while interests of a more limited nature were protected by § 14(g) of ANCSA as valid existing rights to which the conveyance was made subject.

The Secretary of the Interior, however, has adopted a different position which overrules and binds the Board. Secretarial Order 3029, 43 FR 55287 (Nov. 27, 1978), which modified an earlier Secretarial Order on the same subject, states:

Sec. 2 *Policy.* By this Order I hereby adopt the Memorandum from the Solici-

tor, dated October 24, 1978, (copy attached), as the position of the Department on the subject of valid existing rights under ANCSA. I reaffirm my conclusion in Order 3016 that, if prior to the passage of ANCSA, lands which were tentatively approved for selection by the State of Alaska were * * * (b) patented or leased by the State with an option to buy under Alaska Statue [sic] 38.05.077 (the so-called "open-to-entry" program); then valid existing rights were created within the meaning of ANCSA. I also now conclude that lands covered by such open-to-entry leases from the State should not be included in conveyances to Native corporations. The Bureau of Land Management should identify third party interests created by the State, as reflected by the land record of the State of Alaska, Division of Lands, and serve notice on all parties of each other's possible interests, but this Department should not adjudicate these interests. This Order is not intended to disturb any administrative determination contained in a final decision previously rendered by any duly authorized Departmental official [sic]. * * *

The Solicitor's Memorandum of Oct. 24, 1978, concluded that lands tentatively approved for State selection, located within the area withdrawn for Native selection by § 11(a)(2) of ANCSA, were not available for conveyance to selecting Native corporations *if*, prior to enactment of ANCSA, such lands were leased with an option to buy by the State to individuals under the State's "open-to-entry" program. The Solicitor also concluded that open-to-entry leases are valid existing rights and should be excluded from the conveyance to Natives.

A fundamental principle of ANCSA is that "[a]ll conveyances made pursuant to this Act shall be subject to valid existing rights." In addition, the sections withdrawing land for Native selection (Sections 11(a), 16(a)) expressly provide that the withdrawal is "subject to valid existing rights." * * *

Although the phrase "valid existing rights" is not specifically defined in Section 3 "Definitions", both the statute and the legislative history offer guidance as to its meaning.

Section 14(g) provides in pertinent part:

"Where prior to patent of any land or minerals under this Act, a lease, contract, permit, right-of-way, or esasement [sic] (including a lease issued under section 6(g) of the Alaska Statehood Act) has been issued * * * the patent shall contain provisions making it subject to the lease, contract (etc.) * * *."

Section 22(b) directs the Secretary "to promptly issue patents to all persons who have made a lawful entry on the public lands in compliance with the public land laws for the purpose of gaining title to homesteads, headquarters sites, trade and manufacturing sites or small tract sites, and who have fulfilled all the requirements of law prerequisite to obtaining a patent."

Section 22(c) protects persons who have initiated valid mining claims or locations in their possessory rights if they have met the requirements of the mining laws.

By regulation the Department has construed Sections 14(g) and 22(b) and provided the mechanism for implementing them. 43 CFR 2650.3–1(a) provides:

"Pursuant to sections 14(g) and 22(b) of the act, all conveyances issued under the act shall exclude any lawful entry or entries which have been perfected under, or are being maintained in compliance

with, laws leading to the acquisition of title, but shall include land subject to valid existing rights of a temporary or limited nature such as those created by leases (including leases issued under section 6(g) of the Alaska Statehood Act), contracts, permits rights-or-way [sic], or easements."

This regulation makes a basic distinction between rights "leading to acquisition of title" and "right of a temporary nature." The former are excluded from the conveyance, the latter are included, but protected for the duration of the interest.

It has been argued that for those rights which lead to the acquisition of title the statute and the regulations also distinguish rights which are created under Federal law an [sic] those created by State law, protecting only the former. I do not agree for several reasons.

First, the authority of the State to create third party interests in tentatively approved (T.A.'d) lands comes from section 6(g) of the Statehood Act, quoted in pertinent part above. Although the State has exercised this authority through State legislation which defines the terms on which persons may acquire leases, etc., the Congress, in ANCSA, clearly considered such leases to be issued under Federal law, namely the Statehood Act. Section 11(a)(2), for example, withdraws T.A.'d land "from the creation of third party interests by the State under the Alaska Statehood Act." Section 14(g), as already stated, refers to leases "issued under section 6(g) of the Alaska Statehood Act."

Therefore, it is appropriate that 43 CFR 2650.3–1(a) does not limit its scope to entries which are maintained under *Federal laws* and lead to the acquisition of title, but says simply "laws leading to the acquisition of title."

Second, I do not believe the listing of the rights to be protected was intended to be limiting, but rather was *ejeusdem generis*. The regulation already quoted (43 CFR 2650.3–1(a)) precedes its list with "such as those created by * * *," indicating clearly that the list is not exhaustive. Furthermore, there is not longical [sic] reason why Congress would have intended to protect rights of * * * individuals which lead to the acquisition of title under such Federal laws as the Townsite Act or the Homestead Act, but did not intend to protect the same * * * individual when the law under which the rights are being perfected is a State law.

It is my conclusion, therefore, that the department's regulations have construed "valid existing rights" under ANCSA to include rights perfected or maintained under State as well as Federal laws leading to the acquisition of title.

This conclusion is reinforced by the provisions of Section 11(a)(2) which provides that the withdrawal of State selected and T.A.'d lands is from "all forms of appropriation under the public land laws, including the mining the mineria [sic] leasing laws, *and from the creation of third party interests by the State under the Alaska Statehood Act.*" The italicized language reveals that third party interests created by the State are considered to have been created "under" the Statehood Act, which is a Federal statute. Also by withdrawing the land from the future creation of third party interests by the State, there is a strong implication that third party interests already created were considered "valid existing rights." Finally, the fact that the lands are withdrawn" from appropriations under the mining laws makes it clear that "valid existing rights" as used in Section 11(a)(2) contemplates rights which lead to the acquisition of title as well as those of a temporary nature.
[Footnotes omitted. Italics in original. 43 FR 55288–89 (Nov. 27, 1978).]

[1] In accordance with this clearly expressed Secretarial inter-

pretation of Departmental regulations, the Board reverses its former position and finds that an open-to-entry lease issued under A.S. 38.05.077, including any associated right to purchase the leased land granted by State statute, is protected as a valid existing right under ANCSA, and the leasehold must be excluded from any conveyance to a Native corporation under ANCSA.

EFFECT OF PRIOR DECISION ON ADJUDICATION OF APPELLANT'S RIGHT

The Board in *Appeal of State of Alaska* and *Appeal of Seldovia Native Association, Inc., supra*, adjudicated the conveyance covering all lands included in the April 1978 decision which is appealed by Mr. Miller. However, it is undisputed that Mr. Miller received neither actual nor constructive notice of the decisions to convey which were appealed and docketed as VLS 75–14 and VLS 75–15. Those decisions were not published in the *Federal Register* or any newspaper. As Mr. Miller's open-to-entry lease was not included in a listing of State-created third-party interests provided to BLM by the State of Alaska, neither BLM nor the Board notified Mr. Miller of the decisions or his appeal rights. Mr. Miller's first notice of a conveyance which might affect his open-to-entry lease came with BLM's publication of the April 1978 decision, which specifically listed Mr. Miller's lease, ADL # 41005 as an interest excluded from selection by Seldovia Native Association, Inc., but considered selected by BLM for reasons of compactness and contiguity.

[2] Conveyances to Seldovia Native Association, Inc., were among the earliest processed by BLM and current publication and notice requirements had not then been adopted. Regulations in 43 CFR 4.21(c) permit the Board to reconsider a decision in extraordinary circumstances. Where a person received no notice of a decision affecting his open-to-entry lease, and where the Secretary has reconsidered and reversed the Board's ruling on valid existing rights in an appeal from that decision, the Board considers these circumstances extraordinary within the meaning of 43 CFR 4.21(c) and will reconsider its ruling. Therefore, the Board treats Mr. Miller's appeal as a request for reconsideration of its decision in ANCAB VLS 75–14 and VLS 75–15, and grants such request insofar as that decision affects Mr. Miller's open-to-entry lease.

The Board finds that Mr. Miller's open-to-entry lease, ADL #41005, is a valid existing right protected under ANCSA; that such protection applies not only to the lease but to any associated right of purchase; and that the lease must therefore be excluded from the conveyance to Seldovia Native Association, Inc.

The decision of the Bureau of Land Management here appealed is reversed to the following limited extent: (1) rejection of the State of Alaska's selection A–050903 is reversed insofar as it includes lease ADL #41005; (2) inclusion of lease ADL #41005 in the conveyance of land to Seldovia Native Association, Inc., is reversed.

The Bureau of Land Management is hereby directed to take action consistent with this decision.

This represents a unanimous decision of the Board.

JUDITH M. BRADY,
Administrative Judge.

ABIGAIL F. DUNNING,
Administrative Judge.

DUE MAY 22 '80 DOC

The decision of the Bureau of Land Management here appealed is reversed to the following limited extent: (1) rejection of the State of Alaska's selection A-050-00 is reversed insofar as it includes lease ADL #41005; (2) inclusion of lease ADL #41005 in the conveyance of land to Seldovia Native Association, Inc., is reversed.

The Bureau of Land Management is hereby directed to take action consistent with this decision.

This represents a unanimous decision of the Board.

JUDITH M. BEARY,
Administrative Judge.

ARMAIL F. DUNCKING,
Administrative Judge.

DUE AUG 22 '80 DOC